Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

Robert L. Alexander, M.D. Pro Se
Petitioner(s)

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can repressed memories be used as newly discovered evidence if while placed at the Federal Medical in Rochester, Minnesota it is discovered through Psychoanylasis that the petitioner had a mental illness which rendered him unable to distinguish right from wrong and unable to conform his conduct to fit the norm of society during the commission of the crime. Well in 1991 a panel of three Appeal Court Judges for the Sixth Circuit thought so, and REMANDED this case back to the District could to "make more comprehensive findings of fact to be analyzed under each of the prongs of the test outlined in United States v Barlow." This case under three separate Appeal Court Judges in 1994 who looked at the same set of facts under the same rules and then came up with a different decision. The effect of this is to create a public image of unfairness and conflict within the Appeals Court. I would think that the Supreme Court should grant this petition for Writ of Certiorari so that this

conflict within the same Appeals Court may be resolved, don't you agree?

Question 2

Is the Defendant entitled to a new trial if on REMAND from an ORDER of a United States Court of Appeals the Trial Attorney admits, that he, the trial attorney, was mentally impaired during the trial and "I did not want to go to trial then...and I was depressed...I was not really mentally prepared to try his case...I am not mentally sharp like I like to be, going through this stuff, man. I'm having post-trial syndrome, and it was not a result of me trying cases, it was a result of being tried" as stated by Trial Attorney Milton from his Deposition on 9/29/93. Isn't this Constitutional Rights Violation 6th Amendment - ineffective Assistant of Counsel? Attorney Milton further states that he knew his client was suffering from a severe mental illness (Manic-Depressive Bi-Polar Illness) but yet he refused to tell the trial Court of this.

Question 3

Does a United States Court of Appeals have the authority to ignore a previous Appeals Courts Order on Remand which says that "the District Court must make more comprehensive findings of facts to be analyzed under each prong outlined in US v Barlow, "Motion for New Trial."

Question 4

Does a United States District Court have the right to deny a defendant's Claim of "Stacking the Jury" in violation of Batson v Kentucky, 476 US 79,39 Crl 3061 (1986) because the district court judge says that he has no independent recollection as to the race of the jurors?

Question 5

Does a United States Court of Appeals have subject matter jurisdiction to selectively ignore key statements make by the trial attorney in his deposition on Remand?

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OPINIONS BELOW

1. August 8, 1989, Bureau of Prison Board Certified Psychiatrist, Dr. Somepalli, stated that Petitioner was in a Manic Phase when crime was commited (insanity state).

2. October 5, 1990, decision No. 90-1248, 6th Circuit Court of Appeals Judges Keith, Guy and Engel unanimously REMANDED this case backe to District Court. It stated that "Upon remand rather than restrict its 2255 review to the imposition of sentence, the district court will consider the merits of the claims Alexander raised in his 28 USC 2255 Motion, as he seeks to challenge his conviction and imposition of his sentence.

3. July 2, 1991, decision No. 90-1525, is a motion pursuant to Rule 33 a "Motion for a New Trial," based on newly discovered evidence. This case was unanimously REMANDED back by the 6th Circuit Court of Appeals to the District Court "to make more

comprehensive findings of fact to be analyzed under each of the prongs of the test outlined in United States v. Barlow.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the unpublished per curiam opinion, entered October 3, 1994, by the United States Court of Appeals for the Sixth Circuit denying Petitioners appeal for failing the first Strickland prong and also for failing the prejudice prong and performance prong of Strickland. Also the Appeals Court felt that Petitioner's claim for a new trial based on newly discovered evidence was meritless. Also, it claims that the premptory challenges of all black jurors were not in violation of Batson v. Kentucky, 476 US 79, 88-89 (1986).

Petitioner's Petition for Rehearing en Banc was denied by the United States Court of Appeals for the Sixth Circuit by an order entered December 14, 1994. This petition for Writ of Certiorari is submitted within ninety days after entry of

the order.

STATEMENT OF THE CASE

Petitioner is a black physician who has Manic-Depressive Bipolar Illness. This disease is a very serious genetic disease and is inherited. A person is BORN with this mental illness, at the evidentiary hearings the Psychiatric expert, Dr. Kenneth Edelman on September 20, 1993, went into great detail in explaining this illness to Judge Duggan and he made it very clear on Page 9 that this disease was inherited. The genetic medical facts and data comes from the American Psychiatric Association and DSM III. The disease it is caused by a genetic inborn error of a chemical imbalance "in the brain" of a substance called Lithium. A person born with this disease, will have it all his life, so on Page 2 of the order dated October 3, 1994, the Judges statement is not confirmed by medical fact. When they stated "Alexander produced no evidence that he was

diagnosed or treated for a mental disease in 1982." He was not treated in 1982 because if he had been treated in 1982, then he never would have went to work at the Clinic. The Bureau of Prison Board Certified Psychiatrist, Dr. Somepalli, stated that Petitioner was in a Manic Phase when he went to work at the Clinic, (please see his court ordered Psychiatric evaluation dated August 8, 1989) Also, at evidentiary Hearing on September 20, 1993, Dr. Edelman agreed with Dr. Somepalli's evaluation pp.10-12. Board Certified Forensic Psychiatrists have the expert knowledge in their area of training to state with <u>fact</u> what a person's mental state was during the commission of a crime with accuracy. Just like a Board Certified Forensic Pathologist can determine the exact cause of death of a person and what killed that person and the method of death and how long he has been dead, etc. Their expert testimony is admissable in a Court of Law as evidence, so the Psychiatrists

testimony is evidence on this case. The Manic state progresses to the point where judgement is impaired and contact with reality is lost. A Manic Phase can last up to as long as 6-8 months. Dr. Edelman, at the Evdentiary Hearing on September 20, 1993 pp 11-12 stated "A person in the Manic Phase is unable to conform his conduct to the requirement of the law or know the difference from right and wrong.

As stated from Psychiatrist at the Robbinwood Clinic in August, 1988, please see reports submitted at evidentiary hearing in 1993, that Appellant was in the Manic Phase then, and also during the trial and at sentencing. So, Appellant did not object to "the presentence Investigation Report that said he suffered from no mental illness" but Appellant's attorney should have objected to this because Attorney Milton stated at his Deposition on 9/29/93 pp 2-3 that Appellant informed him (Attorney Milton) that he was suffering from Manic-Depressive

Bipolar Illness. Attorney Milton says that he was informed by the Petitioner of this fact after the trial, Post Conviction, but before sentencing (please see pp 2-3 of Attorney Milton's Deposition) Also please read page 17-18 of Attorney Milton's Deposition upon which he stated that "Dr. Alexander had some problems after the contact that I had with him. I described it as a sociopathic type of behavior; that he was obsessive compulsive"; in 1986 prior to trial and re-trial. Obsessive Compulsive Mental Illness is a very serious mental illness as defined by the American Psychiatric Association and Defense Counsel had a duty to inform the District Court of this fact especially since he stated that he suspected a "Mental Illness" as stated in his Deposition of 9/29/93, so here both prongs of the Strickland test is met and ineffective counsel "blocked" evidence that supported the mental illness theory.

At the least, Counsel should have raised

mental illness in mitigation at sentencing since Attorney Milton clearly knew Petitioner was suffering from a Manic-Depressive Bipolar Ilness at best the Federal Judge could have ordered Petitioner to have a complete Psychiatric Evaluation for 30-60 days at the Federal Medical Center prior to sentencing, but Attorney did not inform the Judge of this fact, yet he stated at his Deposition (on 9/29/93, p.3, lines 7-8) that Petitioner informed him of his Manic-Depressive Bipolar Illness "after the verdict, but prior to sentencing." Counsel had a duty to his client to inform the Judge of Petitioner's mental illness prior to sentencing. Attorney knew at sentencing but yet he refused to inform the Judge of his Client's disease. Petitioner Alexander was rendered helpless to inform the Judge of his serious mental illness due to the nature of his serious condition.

Attorney Milton admitted he gave Petitioner "ineffective Assistance of Counsel" in a "Motion

to Withdraw as Counsel" dated 2/6/89, to the Sixth Circuit Court of Appeals. Attorney Milton states on page 2 that in his (Attorney Milton's) opinion, "the case numbered 86-80328 and 87-80180 respectively were inextricably related and the intervening charge against him (Attorney Milton) had substantially chilled his ability to provide Defendant Appellant Alexander with "Effective Assistance of Counsel".... "these concerns were placed on the record in the trial court" as stated by Attorney Milton in his "Motion to Withdraw as Counsel." Counsel's performance was constitutionally deficient because Attorney Milton admitted at the Deposition on 9/29/93 pp.21-22 at Evidentiary Hearing that he (Attorney Milton) was mentally impaired during the Trial. Counsel stated that he was not "mentally sharp" that he (Counsel) was having "post-trial syndrome" p.21 lines 14-18 and trial Counsel admitted he was "depressed" p.22 line 3, dated 9/29/93. Trial Counsel clearly admits during the

evidentiary hearing that he gave Petitioner Alexander "Ineffective Assistance of Counsel" because Counsel was "depressed" "not mentally sharp". Counsel admits on page 21 line 25 and page 22 lines 1-3, "I did not want to go to trial then. I was not really mentally prepared to try his case . . . and I was depressed", Statement of defense counsel on 9/29/93. It would seem to the Petitioner that if the Defense Counsel admits in open court that he rendered the Petitioner with "Ineffective Assistance of Counsel" at trial that this admission of guilt is enough proof "element proof."

Here attorney Milton's representation of Dr. Alexander was subpar because he:

* Failed to investigate the criminal histories of, and inconsistent statements, by office workers (female) who had plea guilty or confessed to the crime that Dr. Alexander was charged with.

* Failed to pursue <u>alternative</u> theories suggested by the evidence - Failed to check out

Dr. Alexander's mental illness but yet he (Milton) admits to knowing and being informed of Dr. Alexander manic depressive bipolar illness "after the conviction, but prior to sentencing" (see deposition page 2-4 (9/29/93) but yet Milton does not include this information at sentencing or in the presentence investigation report. Dr. Alexander stated in open hearing 8/23/93 pp. 12-17) that he informed Attorney Milton of this mental illness on 4 different occasions as well as after the conviction as stated by Attorney Milton.

Petitioner's fourth claim of "conflict of interest" does have merit because Defense Counsel's Motion to Withdraw as Counsel to the Sixth Circuit Court of Appeals admits that He (counsel) felt there was a "Conflict of Interest" so if Defense Counsel knew and felt that way he should have objected, but Counsel did not, because he was ineffective. Petitioner being in the "Manic Phase" was helpless to object. Also,

if the trial counsel fails to object when obviously aware of the circumstance giving rise to an objection is "ineffective assistance of counsel."

When stating from Strickland v Washington, it must be stated that there was a Conflict of Interest because Mr. Milton's previous status as a co-defendant with Petitioner in the "obstruction of justice" case created a conflict of interest which carried over into the instant trial "See Motion to Withdraw as Counsel".

Petitioner's desire to have Mr. Milton continue to represent him was based on an ineffective waiver of his right to an attorney free of such conflict, Wilton v Mintzes, 761 F2d 275, 279-287 (6th Cir 1985). Where such a conflict of interest is established, the prejudice prong of Strickland v Washington US 104 SCt 2052 (1984) is presumed, see also Cuyler v Sullivan, 446 US 335, 350 (1980). In United States v Renda, 669 FSupp 1544, 1548-1551 (D Kan

1987), the court held that the proper prcedure to be followed in conflict of interest cases is to have the defendant waive conflict-free counsel both orally and in writing after being advised, again both orally and in writing, in open court, of the right to independent counsel. Although the record in the instant case reveals that the court asked petitioner whether he wanted to continue with Mr. Milton as his Attorney, he was never advised of his rights nor did he waive them in court, see United States v McLain, 823 F2d 1457, 1463-1464 (11th Cir 1987).

Here in Mr. Milton's own deposition, he admits that he (Milton) was Impaired at the time of trial as a defense attorney, Milton says that he was suffering from a Mental Depression caused by the actions which had led to him also being indicted and tried along with his now Client, petitioner Alexander. Milton at his deposition, says that he was impaired due to "Post Trial Syndrome", (see Attorney Deposition of 9/29/93

pp.21-22). Now Attorney admits he was impaired and ineffective as an attorney at trial. Attorney Milton, in 1988, prior to trial never ever told the court or Dr. Alexander that he was in a "Post Trial Syndrome" or "Depressed" or in a "Depression" or not as "mentally sharp". How can an attorney who is mentally impaired give effective counsel to anyone. If Appellant Alexander would have known that Milton was "mentally depressed" and ailing from "Post Trial Syndrome" he (petitioner) would have requested another attorney.

Petitioner has an inborn inherited, genetic disease/illness which is caused by a serious chemical imbalance in the brain of a substance called Lithium. If a person is born with an inherited, genetic illness/disease, then he will have this disease all of his life. So Petitioner did have this Manic-Depressive Bipolar Mental Illness in 1982 while working at the Clinic where the crimes were committed. Dr. Kenneth Edelman

clearly stated at the evidentiary hearing that this disease/illness is inherited and there was a "familiar history" as well, and since this is an inherited/genetic illness, "There is a correlation - - higher incidence of Bipolar Illness in those with relations of mania - - or Bipolar Illness" as stated by Psychiatric expert Dr. Kenneth Edelman, p.9 lines 10-15. So Petitioner was already diagnosed in 1982.

REASONS FOR GRANTING

PETITION FOR WRIT OF CERTISORARI SHOULD BE GRANTED WHERE THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT REMANDS A CASE BACK TO THE DISTRICT COURT IN 1990 AND 1991 WITH SPECIFY INSTRUCTIONS TO FOLLOW BUT THE DISTRICT COURT DOES NOT ADHERE TO THOSE INSTRUCTIONS AND DENIES THE MOTION AND ON RE-APPEAL THE NEW PANEL OF JUDGES FOR THE SIXTH CIRCUIT DOES NOT ENFORCE THE PREVIOUS JUDGES INSTRUCTIONS.

This present Supreme Court case is a combination of two previous Appeals Courts cases numbered 90-1248 and 90-1525 respectively, remanded back to the District Court with specific instructions to be followed by the Appeals Court.

1. Case 90-1248 is a 28 U.S.C. Motion to Vacate,

Set Aside or Correct his sentence. This case was unanimously REMANDED back to the District Court by the Honorable Appeals Court Judges Keith, Guy and Senior Appeals Court Judge Engel in an order dated (filed) October 5, 1990. These Appeals Court instructions were that the District Court "Upon remand rather than restrict its 2255 review to the imposition of sentence, the district court will consider the merits of the claims Alexander raised in his 28 U.S.C. 2255 Motion, as he seeks to challenge his conviction and imposition of his sentence. The (District) Court must decide whether Alexander established he was denied a substantive right or whether there was a defect in the proceeding which was inconsistent with the rudimentary demands of fair procedure. See United States v Timmreck, 441 U.S. 780, 783 (1979). At present time reviewing over the District Courts opinion ORDER of November 10, 1993 none of the instructions ORDERED on remand were followed except one - the consideration to

"Vacate Sentence." Petitioner Alexander has shown at the Evidentiary Hearings ample evidence and testimony of why his "conviction and imposition of sentence" should be corrected and/or set aside.

This Petitioner asks this Honorable United States Supreme Court to please "Set Aside" his "conviction and sentence" because the Appeal Court "did not" follow the instructions Ordered on Remand, by the previous Appeal Court Judges.

In order to assist this Honorable Supreme Court in understanding these claims, Petitioner will herein set forth a brief summary of this evidence presented at evidentiary hearings.

Claim A: Violation of the Batson Rule "stacking the Jury" at the August 23, 1993 hearing, Petitioner presented testimony that at the time of re-trial, he questioned his Defense Counsel on "why all the blacks were being excused from the Jury, except one light-skinned black." Petitioner complained to Counsel as black Jurors

were dismissed by AUSA Walter Piszczatowski's peremptory challenges.

Appelant Alexander complained to Mr. Milton as the black jurors were dismissed by AUSA Walter Piszczatowski's Peremptory Challenges. Appellant Alexander was never ever given a reason by Mr. Milton at the time of the jury selection of why he (MIlton) would not and did not object to blacks being excluded by peremptory. But now, Appellant Alexander reads Milton's Deposition of 09/29/93. On pp13-14 Milton says that he (Milton) was informed by (I supposed) AUSA Pisczzatowski (because he is the only person that can give a "Charge") that Appellant Alexander had "Approached this juror and talked to this juror". Apparently this is the reason AUSA Piszczatowski gave to Mr. Milton for excluding black jurors; if so this is clearly <u>Prosecutorial Misconduct</u> because Appellant Alexander never ever approached a juror or made conversation. The court records and transcripts do not bare out any court records

of proceedings indicating a matter of this type was brought to the "Courts Attention" as stated at Milton's Deposition (on 09/29/93 p14). Judge Duggan also stated in his opinion that "Dr. Alexander had improperly approached that (black) juror." This is still NO reason to excuse all the other black jurors from the jury panel.

Supreme Court Justice Kennedy said that racial discrimination by the government in the selection of a jury causes "real injury" both to the defendant and to the excluded jurors, regardless of the race of the individuals involved.

Baton Issue (see transcript dated 8/23/93 p .32)

Again AUSA Blake attempts to mislead this Appeal's Courts by not telling the "whole truth". Attorney Milton stated on p.13 of his Deposition given on 9/29/93 lines 20-22.

Q. Do you remember whether the prosecutor excused any black jurors on peremptories?

A. I don't recall precisely - - exactly.

p.14 line 2 - A (attorney Milton) ---there was a---it seems to be there was a black juror on Dr. Alexander's---I'm not sure.

p.14 lines 5-7 Q, AUSA Blake, "Well if he had said to you, "I think that the prosecutor is excusing all the blacks and it's because of recial prejudice, "what would you have done?"

p.14 lines 14-20 A. Attorney Milton, "...my only consideration with the situation, when it happened to Dr. Alexander, is I was kind of...it was a <u>situation</u>---when he had approached <u>this</u> juror and talked to this juror, knowing that this was a juror, and it was <u>brought</u> to the Courts attention, I was afraid that he might catch another charge."

Apparently attorney Milton was informed by AUSA Walter Pizctowski that Dr. Alexander had approached one of the black potential jurors and felt threatened that Dr. Alexander would get another "charge", see Milton Deposition 9/29/93

(pp 13-14), so Dr. Alexander supposed. For Milton NOT to object to the government's use of peremptory challenges to remove black jurors from the jury panel violated Batson v Kentucky, 476, U.S. 79 (1986).

For example, in Gates v Zant, 863 F2d 1492, 1500 (11th Cir 1989), the Court held that trial counsel's ineffectiveness may provide cause and prejudice for the failure to raise this issue at trial; see also Birt v Montgomery, 725 F2d 587, 596-601 (11th Cir 1984).

At the trial, Attorney Milton should have objected to the prosecution stacking the jury with all white jurors except one black female. The other black jurors were asked to step down one by one. The jury make up of less than 1% black is not by any means reflecting the percentage of the black population of the Eastern District of Michigan Southern Division. There should be a "representative venire" drawn from a fair cross-section.

The U.S. Supreme Court's leading case on discrimination in peremptory challenges, Batson v Kentucky, 476 U.S. 79, 38 Crl 3061 (1986), rested on the rights of the venire members as well as those of the Defendant, the court pointed out. To focus only on the final racial makeup of the jury ignores the excluded venire member's.

The use of racial criteria in the government's selection of a jury is unconstitutional, regardless of the race of the defendant or of the excluded jurors. Defense Attorney Milton's reason, in his deposition (9/29/93 pp.13-14), for why black were excluded from the jury is clearly a violation of Alexander's Constitutional Rights and his (Milton's) actions fall to a level of being clearly ineffective, as a defense counsel and Petitioner was not satisfied "...with the jury as it was composed" as stated by defense counsel in his deposition. Why would a black man be satisfied with a jury composed of 11 white and

one black when there could have been 5 black and 7 white jurors - defense counsel's statement does not make sense.

THE JURY MAKE UP OF LESS THAN 1% BLACK IS NOT BY ANY MEANS REFLECTING THE PERCENTAGE OF THE BLACK POPULATION OF THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION.

THERE SHOULD BE A "REPRESENTATIVE VENIRE" DRAWN FROM A FAIR CROSS-SECTION.

Claim B

2. Case 90-1525 is a motion pursuant to Rule 33 a "Motion for a New Trial", based on newly discovered evidence. This case was remanded back to the District Court by Appeal Court Judges Krupansky, Melburn and Brown (date filed July 2, 1991) with specific ORDERS to follow Judges stated "this court orders that the case be REMANDED to the district court to make more comprehensive findings of fact to be analyzed under each of the prongs of the test outlined in United States v Barlow. The district court

clearly abused its discrection and did not follow the order on REMAND. In discussing the district court's opinion and order November 3, 1993, this petitioner states very clearly that there is no where in the Order or Opinion indicating that the Judge made "more comprehensive findings of facts to be analyzed" because if he would have, then a New Trial would have been ORDERED.

There have been case precedents set so as to the standards which a motion for a new trial must meet, and this case meets all those standards and more. See United States v Barlow previously sighted.

At the Evidentiary Hearings, the expert testimony of Dr. Kenneth Edelman clearly stated that in the Manic State in 1982, Dr. Alexander was unable to conform his conduct to the requirement of the law and also could not distinguish between right and wrong (see pp.11-12, Hearing on September 20, 1993). Dr. Alexander proved at the hearing that: A. The

affects of this severe Mental Illness (Manic Depressive Bipolar Illness) on this Appellant's behavior and actions, which led to his incarceration, was involuntary. Although it is true that he has had this illness since birth, but like so many patients with this illness, he was NOT educated or able to understand the full effects or nature of the illness and its impact on his life until after incarceration at the Federal Medical Center, as indicated by the medical records. B. This illness being Psychological in origin could not have been discovered earlier with due diligence because the Appellant was afflicted with the illness. The Manic-Depressive Bipolar Illness (untreated) rendered the defendant helpless to accurately explains to the court exactly what was happening to him. He was sure his attorney was aware of it, from previous discussions. He tried his best to get himself "mentally prepared" for the trial, but due to the Manic-Depressive Illness, he was

unable to. The defendant tried diligently to search his own mind to explain to the court, but his illness rendered him with "delusion of grandor", "paranoia ideation", "poor insight", "bad judgement", "pressured speech", "auditory hallucinations", and "flight of ideas". All of the sickness which a person with this mental illness has. It was not until the Defendant-Appellant's two and one-half (2-1/2) months of intensive psychotheropy sessions and meetings with the staff Psychiatrists and Psychologists did the full nature of his mental illness comes to light, because of Re-pressed (suppressed) memories. But, his Attorney knew he had a mental illness but thought it was Obsessive-Compulsive Disorder and failed to bring it to the Courts (see deposition dated 9/29/93 pp.17-18) attention as required pursuant to Fed. R. Crim. Pro 12.2 not did his attorney offer any psychiatric testimony at his trial or sentencing, but Milton, his attorney, says he knew about this

illness prior to sentencing. (Deposition 9/29/93 pp.2-3) C. This illness is material and not merely commulative or impreaching because, as stated by expert testimony from Dr. Edelman (9/20/93) the illness rendered Dr. Alexander helpless to control his actions, unable to appreciate the nature of his actions and unable to conform his actions to fit society norm (insane). D. If the jury would be presented with this new evidence it would produce an acquittal if the case were retried.

Pursuant to this Appeals Courts July 2, 1991 ORDER on REMAND, the ONUS was placed on the District Court "to make more comprehensive findings of fact to be analyzed under each of the prongs of the test in United States v Barlow" and to come forward with reasons and rationale for its decisions. A mere reference to the record followed by a Cursory statement that the District Court "considered" or "reviewed" this evidence cannot substitute for the specific findings of

fact required by the Appeals Court in its ORDER on REMAND. Nor will a passing reference to some of the "pertinent" testimony at the Evidentiary Hearings, without any written findings in respect to this evidence, suffice to enable this Supreme Court to determine whether or not the District Court has abused its discretion or compiled with the instructions ORDERED on Remand.

At the Evidentiary Hearings in 1993, the United States Attorney presented no additional or supplemental records, evidence or testimony from any expert Psychiatric witnesses in opposition to Petitioner's case. That is because all or most of Petitioner's testimony and medical records comes from the Government's own expert Psychiatrists and Psychologists at the Federal Medical Center.

As stated previously, Petitioner's Counsel proved at the Evidentiary Hearings with medical records, and live Psychiatric expert testimony that each of the prongs of the test outlined in

United States v Barlow was met and this was clearly done so as demonstrated by the Medical Records and Expert Psychiatric testimony, please read Dr. Edelman's complete testimony in order to obtain an understanding of what Manic Depressive Bipolar Mental Illness is (here on page 7, Sept 20, 1993), Dr. Edelman explains DSMIIIR about the illness). He also explains on pages 10-11 about Dr. Somepalli's expert opinion of Dr. Alexander's Manic state in 1982, (here you must understand that Dr. Somepalli, Dr. R. Westrick, Dr. Slama, Dr. Tuan, Dr. Elias, Dr. McCray, and Dr. Soundly are all Board Certified Doctors (Psychiatric) with Dr. Westrick is a Forensic Psychiatric expert, and Chief of Psychiatry at the Federal Medical Center in Rochester, Minnesota, their testimony is weighed very heavily at trial and because of their extensive training which required 4 years college, 4 years medical school, 3-5 years of residency training, and then an additional 2-3 years of fellowship training,

depending on what area of Psychiatry they chose to specialize in, makes them very credible as Experts in the U.S. Federal Penal System. All these Doctors performed independent Psychiatric examinations on Petitioner, all with 30 the same finding and diagnosis. The reports, diagnosis, testimony, and opinions are not to be taken lightly by the court. If this was evidence or testimony in the Government's favor, then the District court would definitely use it. In the United States Court system, we do not have a double standard of Justice - Fairness for all.

Manic-Depressive Bipolar Mental Illness - All this evidence presented to the District Court was newly discovered since the trial. The District Cout, not being an expert in the medical field of Psychiatry nor Psychology, grossly abused its discretion in not making more comprehensive findings of facts, aforementioned doctor reports, and its violated this Appeals Court order on REMAND.

Having proven this the Petitioner prays that this United States Supreme Court grants his request for a new trial pursuant to Rule 33 based on new evidence. Due to Re-pressed (suppressed) memeories brought out in psychotherapy at the Federal Medical Center.

CONCLUSION

The infant mortality rate for some areas of Michigan has been as high as 30 deaths for every 1,000 live born babies, higher than some 3rd (third) World Countries and mainly it affects our blacks and innercity poor white patients. Due to his conviction in 1988 from his working at the Clinic in 1982, Petitioner's medical license has been taken away. Petitioner Alexander's Bi-Polar Illness is now stable and he is able to return to the medical field to help save lives. He is very remorseful, sorry and has repented and has taken a solemn promise to always take his prescribed medication. He is stable (mentally) to return back to the field of medicine, but with a felony

conviction on his record, this possibility is in jeopardy. The information submitted to this Supreme Court in mitigation is overwhelming. Petitioner was born with this illness/disease and he will die with it. The only thing that can be done is to treat the illness with Lithium Carbonate, a pill, and receive phycotherapy which he has done.

At the evidentialy hearing, medical records were entered to the Court from Dr. Ruth Westrick, Chief Forensic Psychiatrst, Federal Medical Center: Dr. Elias, Dr. McCrary, Dr. Somepalli, Dr. Tuan, Dr. Zar, Dr. Slama, Dr. Edelman, and Dr. Daniels all agreeing without a doubt that Petitioner Alexander has the illness as confirmed by blood studies, lab tests, psychotherapy, and blood chemical analysis, all submitted to the District Court and Appeals Court for review. Petitioner Alexander was born with Manic Depressibe Bipolar Illness and "has been suffering from

Manic-Depressive Bipolar Illness since his teens. Regarding his actions in 1982, at that time the patient seemed to be going through a manic phase, which could have impaired his judgement and insight resulting in the illegal activities such as prescribing controlled substances illegally," as stated by Psychiatrist Dr. Somepalli in his Psychiatric Evaluation on 8/8/89 and concurred by Dr. Edelman at the Evidentiary Hearing on September 20, 1993 pp.9-12. This new evidence is also compelling because it meets all the standards under U.S. v Barlow for a new trial.

Recpectfully submitted this 8th day of March 1995.

Sincerely,

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APPENDIX

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No. 90-1248

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT L. ALEXANDER,

Petitioner-Appellant, Filed October 5, 1990

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

BEFORE; KEITH AND GUY, Circuit Judges; and ENGEL, Senior Circuit Judge.

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and appellant's brief, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Robert Alexander moves for bail and appeals from the district court's denial of his 28 U.S.C. S 2255 motion to vacate, set aside, or correct his

sentence. Following a jury trial, Alexander received various sentences including eight years imprisonment, a special parole term, a fine, and a special assessment.

In this motion, Alexander claimed that his counsel was ineffective for failing to bring his mental condition to the trial court's attention, failing to object to certain evidentiary matters and prosecutorial misconduct, failing to investigate and interview certain government witnesses, and other alledged misconduct. He further claimed that his conviction was obtained by use of evidence from an unconstitutional search and seizure. Alexander also alleged that the sentencing judge improperly failed to disqualify himself from the case and improperly denied the appointment of counsel. The court denied the motion for failure to prove that his sentence was illegal and declined to disqualify itself from further proceedings.

On appeal, Alexander argues that his S 2255

motion was improperly denied because the judge failed to consider his alleged mental illness and the grounds raised in the district court.

Upon consideration, we conclude that the district court's order should be vacated and the case remanded for additional proceedings. Upon remand, rather than restrict its s 2255 review only to the imposition of sentence, the district court will consider the merits of the claims Alexander raised in his 28 U.S.C. S 2255 motion, as he seeks to challenge his conviction and imposition of his sentence. See generally Williams v. United States, 416 F.2d 1064, 1066 (8th Cir. 1969) (the extent of review of a motion to vacate is substantially the same as that available by habeas corpus). The court must decide whether Alexander established that he was denied a substantive right, or whether there was a defect in the proceedings which was inconsistent with the rudimentary demands of fair procedure. See United States v Timmreck, 441

U.S. 780, 783 (1979).

For these reasons, the motion for bail is denied and the district court's order of January 26, 1990, is hereby vacated, and the case remanded for further proceedings consistent with this order. Rule 9(b)(6), Rules of the Sixth Circuit.

Issued as Mandate: November 7, 1990

ENTERED BY

L. Green, Clerk

No. 90-1525

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee Filed July 2, 1991

v.

ROBERT L. ALEXANDER,

Defendant-Appellant.

BEFORE; KRUPANSKY and MILBURN, Circuit Judges;

and BROWN, Senior Circuit Judge.

Robert L. Alexander, a federal prisoner, has appealed, pro se, from an order of the United States District Court for the Eastern District of Michigan denying the appellant's motion for a new trial based on new evidence. The district court, on April 11, 1990, denied the appellant's motion for a new trial. On April 27, 1990, the appellant filed a notice of appeal, which was four days out of time. A panel of this court, on November 16, 1990, entered an order dismissing the appeal for lack of jurisdiction, but "without prejudice to any right of appellant to seek and extension of time from the district court for the notice of appeal." United States v. Alexander, No.90-1525, slip op. at 2 (6th Cir. Nov. 16, 1990) (order). On December 5, 1990, pursuant to Fed.R.App.P.(4)(b), the district court entered an order granting the appellant an extension of time until April 30, 1990 to file notice of appeal, which period would include the date on which this

appeal was originally filed.

On December 17, 1990, this court received a handwritten note from the appellant informing the court of the district court's order, which the court construes to be a motion to recall the mandate, to find jurisdiction of the appeal, and to address the merits of the case. This court concludes that the district court had the authority to consider and grant the moation for an extension of time, United States v. Dominguez, 810 F.2d 128, 129 (7th Cir. 1987) (per curiam). See Also United States v. Kaden, 819 F.2d 813 (7th Cir. 1987), United States v. Lucas, 597 F.2d 243 (10th Cir. 1979) (per curiam), and United States V. Hoye, 548 F.2d 1271, 1273 (6th Cir. 1977) (per curiam), all cited in United States v. Christoph, 904 F.2d 1036, 1039-40 (6th Cir. 1990), cert. denied, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). This court also concludes that the district court did not abuse its discretion in granting the motion to extend time. See e.g.,

Kaden, 819 F.2d at 816-17. Therefore, this court now has jurisdiction of the appeal.

Accordingly, the mandate of this court is RECALLED and this court orders that the case be REMANDED to the district court to make more comprehensive findings of fact to be analyzed under each of the prongs of the test outlined in United States v. Barlow, 693 F.2d 954, 966 (6th Cir. 1982), cert. denied, 461 U.S. 945, 103 S.Ct., 77 L.Ed.2d 1304 (1983), following a hearing at which the appellant shall be represented by counsel appointed by the district court.

ENTERED BY

L. Green, Clerk

No. 93-2514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT L. ALEXANDER,

Petitioner-Appellant,

v. Filed October 3, 1994

UNITED STATES OF AMERICA,

Respondent-Appellee.

BEFORE; RYAN and SILER, Circuit Judges, and DOWD, District Judge.

This pro-se federal prisoner, Robert L. Alexander, appeals a district court judgement denying his motion for a new trial and his motion to vacate sentence filed pursuant to 28 U.S.C. S 2255. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Alexander is a physician who was convicted in 1988 of conspiracy and distribution of

controlled substances. His conviction was affirmed on appeal. In his present motion to vacate, Alexander claimed he received ineffective assistance of counsel,

arguing that: 1) his trial attorney should have, but did not, interpose an insanity defense; 2) his attorney did not raise mental illness in mitigation at sentencing; 3) his attorney's selection of defense witnesses was deficient; 4) his attorney was ineffective because of a conflict of interest; 5) his attorney did not object to an ex parte meeting between a prosecutor and the judge; and 6) his attorney did notobject to the government's peremptory challenge of one or more black venirement. In his motion for a new trial, Alexander claimed to have found newly discovered evidence concerning his alleged mental illness.

The district court conducted an evidentiary hearing and denied Alexander's motions to vacate and for new trial. In his timely appeal,

Alexander reasserts his claims that defense counsel was ineffective. He also claims that a diagnosis of him as a manic-depressive with a bi-polar disorder made by prison physicians constitutes newly discovered evidence which entitles him to a new trial.

Upon review, we conclude that the district court properly denied S 2255 relief in this case because Alexander has not established a fundamental defect in the proceedings that inherently resulted in a complete miscarriage of justice or an error so egregious that it amounts to a violation of due process. See United States v. Timmreck, 441 U.S. 780, 783 (1979); United States v. Todaro, 982 F.2d 1025, 1028 (6th Cir.) (per curiamm), cert. denied, 113 S.Ct. 2424 (1993). The court reviews the denial of relief de novo, and employs clear error review of a district court's findings of fact. United States v. Roberts, 5 F.3d 365, 368 (9th Cir. 1993); Warner v. United States, 975 F.2d 1207, 1212 (6th

Cir. 1992), cert. denied, 113 S. Ct. 1314 (1993). Counsel's performance was not constitutionally deficient. In order to establish ineffective assistance of counsel, Alexander must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defense as to render the trial unfair and the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). Absent either element of proof, the claim fails. Id. at 689-90. For his claims enumerated one and two, Alexander argues that this attorney knew that he suffered from a manic depressive bi-polar mental illness and that defense counsel should have presented evidence of the illness at trial and at sentencing. However, Alexander produced no evidence that he was diagnosed or treated for a mental disease in 1982, whent he crimes occurred. In addition, Alexander did not object to the presentence investigation report that said he suffered from no mental illness. Therefore, these claims fail

the first Strickland prong. Defense counsel had no reason to suspect that Alexander was suffering from any serious mental disorder.

As his third claim, Alexander argues that defense counsel was ineffective because counsel's choice of defense witnesses. The receord reveals that counsel's decision with respect to witnesses was an exercise of reasonable professional judgement entitled to great deference. See Strickland, 466 U.S. at 989-90; accord United States v. Morrow, 977 F.2d 222, 229-30 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 2969 (1993). Moreover Alexander does not show that there is a reasonable probability that, but for counsel's alleged unprofessional error, the result of his trial would have been different. Thus, he fails the prejudice prong of Strickland.

Alexander's fourth claim is likewise meritless. Alexander claimed that a conflict of interest arose after his original mistrial when he and his attorney were jointly charged with

obstruction of justice. However, before the second trial, Alexander expressly insisted on defense counsel's continued representation. In addition, the obstruction of justice charge was resolved in the defendant's favor before the second trial. Therefore, a conflict of interest did not exist at the time of trial and Alexander waived his right to object on this ground by expressly insisting on defense counsel's representation. Cf. United States v. Walsh, 733 F.2d 31, 34-35 (6th Cir. 1984) (failure to object when obviously aware of the circumstance giving rise to an objection waives the objection).

Alexander's fifth claim is also meritless. Alexander claimed that an ex parte conference with the prosecutor biased the district judge and that his attorney should have moved for the judge's recusal. Alexander, however, cannot show the slightest manifestation of judicial bias. Without some inerence of bias, defense counsel could not be expected to move the recusal.

Therefore, Alexander cannot satisfy the performance prong of Strickland. Alexander also makes no showing whatever that there is a reasonable probability that had defense counsel moved for the judge's recusal that the result of the proceeding would have been different; and thus, Alexander cannot satisfy the prejudice prong of the Strickland test. Moreover, this court must evaluate the reasonableness of defense counsel's performance within the context of the circumstances at the time of the alleged error. Strickland, 466 U.S. at 690. In this case the conference was held as a result of the court's participation in the criminal trial, and the information learned at the conference was information that the court soon learned in greater detail in the presence of Alexander and defense counsel. Based upon these circumstances, defense counsel made a reasonable decision that a recusal motion was unnecessary. See Liteky v. United States, 114 S. Ct. 1147, 1157 (1994); Sims

V. Livesay, 970 F.2d 1575, 1579-81 (6th Cir. 1992).

Alexander's sixth claim is completely unsupported. Alexander claimed that the prosecution improperly excluded blacks from the jury in violation of Batson V. Kentucky, 476 U.S. 79, 88-89 (1986). However, Alexander makes no showing that specific black veniremen were stricken on peremptory challenge, and neither defense counsel nor the district judge could recall the race of the stricken veniremen. Moreover, defense counsel testified that he and Alexander were satisfied with the composition of the jury. In short, there is no indication that the elements of a prima facie case of race discrimination ever existed, See Georgia V. McCollum, 112 S. Ct. 2348, 2359 (1992), or that counsel's performance was deficient because he did not object.

Finally, Alexander's claim that he is entitled to a new trial based on newly discovered

evidence is meritless. In his motion for a new trial, Alexander claimed that he first discovered that he should have raised an insanity defense only afer he had undergone two and a half months of psychoterapy in prison. It was then that he recalled that he had been diagnosed and treated for a manic-depressive syndrome in the 1970's. Based upon his newly discovered realization of a mental illness, Alexander moved for a new trial. The district court concluded that Alexander's motion was not based on evidence which was discovered only after trial or which could not have been discovered earlier in the exercise of due diligence. The district court's conclusion is not clearly erroneous. See United States v. Christian, 786 F.2d 203, 210 (6th Cir. 1986).

Accordingly, the district court's judgement denying the motion for new trial and motion to vacate filed pursuant to 28 U.S.C. S2255 is hereby affirmed. Rule 9(b)(3), Tules of the Sixth Circuit.

ENTERED BY

L. Green, Clerk

No. 93-2514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT L. ALEXANDER,

Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Filed

December 14, 1994

BEFORE; RYAN and SILER, Circuit Judge; and DOWD, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members, but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has ruther reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY

L. Green, Clerk

YANKTON FEDERAL PRISON CAMP

PSYCHIATRIC EVALUATION

NAME; ALEXANDER, ROBERT L.

REG. NO.: 07841039

DATE; 08-08-1989

BACKGROUND INFORMATION: Mr. Alexander is a 35 year old, married, black male who has been incarcerated

at the Yankton Federal Prison Camp since January of 1989. He was brought here after being sentenced for four years on charges of conspiracy to dispense controlled substances. Mr. Alexander states that he was indicted in May of 1986.

Apparently the App. 54 alleged crime took place in 1982 when the patient was doing an internship and moonlightling at a medical weight loss clinic. He states that at the time he was going through a manic phase and that he was using poor judgement and prescribing diet pills such as dextroamphetamines to patients at times without seeing them after the initial followup. He stated that he did not commit any crime and that he was inexperienced and used poor judgement when he renewed the prescriptions. He claims that the staff at the clinic took the prescriptions off the patients' charts and sold them illegally.

Mr. Alexander gives a long history of manic-depressive illness since his high school years. He stated that he had been a success at school, being the captain of the football and basketball teams. He felt that he could do anything and at times felt "he was God". His manic-depressiveness has continued and he was very

successful academically. Subsequently he was enrolled in the medical school at Michigan State University. He reports that in 1978 and during his third year of medical school he had a manic episode and was prescribed and treated with Lithium for three months. He reportedly stopped the Lithium on his own and his mood became normal and then the patient had a depressive episode between 1975 and 1976 during which time he was very depressed and having somatic delusions such as believing the insides of his body were rottening, were "rotten".

Between 1986 and 1986 the patient was working as Chief Resident in the Obstetrics/Gynecology Department in Detroit during which time he

describes repeated manic episodes which resulted in poor decision making and problems with his superiors. Between 1975 and 1988, despite having recurrent manic and depressive episodes, the patient did not have any treatment, either

outpatient of inpatient due to his poor insight and judgement. In Spetember of 1988, he was seen by a psychiatrist in Detroit who prescribed Lithium which the patient took for about a month and a half with good results. As you can see, the patient has been noncompliant with his Lithium terribly and repeatedly, resulting in recurring manic and depressive episodes. After his arrival at Yankton Federal Prison Camp in January of 1989, the patient was seen by this writer who found him to have manic-depressive illness and started him on Lithium immediately. Once the patient started taking Lithium his manic symptoms improved and he became faily stable. At present the patient is on Lithium
300 mg tid and Navane 10 mg at bedtime. He also takes Benadryl 25 mg at bedtime for insomnia. I understand he is considered fairly stable with some residual manic symptoms such as euphoria, slightly slurred speech and insomnia.

CONCLUSION: In this writer's opinion, Mr. Alexander has been suffering from manic-depressive illness since his teens. Regarding his actions in 1982, at that time the patient seemed to be going through a manic phase which could have impaired his judgement and insight resulting in the illegal activities sich as prescribing controlled substances illegally. People with bipolar disorders are prone to antisocial activities such as writing bad checks, substance abuse, getting into fights and disorderly conduct. It is evident in Mr. Alexander's case that he has been struggling withn manic-depressive illness since his high school years and he hever had any proper treatment up until 1978, and even at that point he received Lithium for only three months. The next time he took Lithium was in September of 1988 for a month and a half. Between 1978 and 1988, his manicdepression continued unabated and it seemed

the patient had made many decisions with impaired judgement due to his manic mood.

In 1982, he seemed to be in a manic mood, and suffering from a manic episode and he could possibly have impaired judgement when he prescribed dextroamphetamines. At present, Mr. Alexander is fairly stable on Navane and Lithium. He continues to have some residual symptoms such as slightly irregular speech, some euphoria, and insomnia.

R.B. Somepalli, M.D.